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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-938

COX BROADCASTING CORPORATION AND
THOMAS WASSELL,
Appellants,

v.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

APPELLEE'S BRIEF

STATEMENT OF THE CASE

Appellee agrees substantially with Appellants' statement of the case, but believes that certain additional facts should be added to put the issues in proper perspective.

The death of Appellee Martin Cohn's daughter led, some six months later, to the indictment of six young men for rape and murder (A. 19). The case became the object of the most intense publicity in which numerous charges were made (A. 30, 33). So heated was the publicity that Appellee found it necessary to remove his children from school and send his family out of town and was almost unable to continue his regular business activities (A. 31). Due to this publicity and to the facts which were being related by the press concerning the victim (Appellee's daughter) and the conduct of the defendants, a Fulton County Superior Court Judge issued an order restraining counsel for the State and the defense from making any statements to the press; however, news coverage of the case continued unabated (A. 34).

On April 10, 1972, the murder charges were dismissed by the State and five of the six defendants pleaded guilty to rape or attempted rape (A. 35). The sixth defendant pleaded not guilty and his case was set for trial (A. 35). That same evening and in the early hours of the following day during two newscasts over Appellants' local television station, the happenings in Court were related, including the identification by name of Appellee's daughter as the victim of the multiple rapes (A. 35). Because of these broadcasts, the successful prosecution of the remaining case was impeded, as Appellee was torn between seeking justice for his daughter and the well-being of his family (A. 15). Appellee's fear of future use of his and/or his daughter's name in fact led to a disposition of the case by a plea to attempted rape, rather than by a trial (A. 36).

ARGUMENT

I.

INTRODUCTION AND SUMMARY

By its ruling, the Supreme Court of Georgia has held that a civil action for invasion of privacy lies upon proof that Appellants publically disclosed the name or identity of the victim of a rape with willful or negligent disregard for the fact that reasonable men would find the invasion highly offensive. The Court further held that a 1968 Georgia criminal statute (*Ga. Code Ann.* § 26-9901)[1], which prohibits the public dissemination of the name or identity of the victim of a rape or attempted rape through the mass media, is a legislative determination that such disclosure is not a matter of public interest or general concern in Georgia. The right to disclose the identity does not rise to the level of *First Amendment* protection.[2]

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[1] Ga. Code Ann. § 26-9901: "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

[2] Appendix to Jurisdictional Statement, A-9-21, A-24-26.

> "A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment."[3]

For reasons elaborated herein, Appellee does not believe, in the first instance, that this Court should grant jurisdiction as the judgment of the Supreme Court of Georgia lacks the requisite finality as mandated by *28 U.S.C. § 1257.* On the merits of the case itself, Appellee contends that, in viewing the conflicting social and constitutional values in issue, the actual *raison d'etre* for the *First Amendment* as articulated by this Court[4] is wholly inapplicable because the *First Amendment* interest in public knowledge of the specific identity of a rape victim does not exist, or is of so little importance that the social and *First Amendment* interest in privacy is overwhelming in comparison.

II.

THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS APPEAL.

In the decision below, the Supreme Court of Georgia, pursuant to motions for summary judgment filed by both

[3] Appendix to Jurisdictional Statement, A-25.

[4] E.G., Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) and Rosenbloom v. Metromedia, 403 U.S. 29 (1971)

parties, ruled, in effect, that Appellee's complaint stated a cause of action for invasion of privacy that was not barred by the *First Amendment*[5], also ruling that *Ga. Code Ann. §26-9901*[6] was a constitutional exercise of legislative power that declared that the public dissemination of the specific identity of the victim of a rape was not a matter of legitimate public concern in Georgia, and thereby not protected by the *First* and *Fourteenth Amendments.*[7] The Court reversed Plaintiff-Appellee's motion for summary judgment on liability, which had been granted by the trial court, and affirmed the lower court's denial of defendants-Appellants' motion for summary judgment, and the case was remanded to the trial court for a determination of the factual issues of liability.[8] It is submitted that this posture of the case does not make it a "final" judgment or decree in the sense required by *28 U.S.C. §1257.*

Before proceeding to an appropriate definition of "finality", certain of this Court's pronouncements on its role in the appellate system may help put the issues in perspective. This Court does not, for example, sit as a super legislative body and is not concerned with what philosophy a state should or should not embrace.[9] It is also not the function of

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[5] Appendix to Jurisdictional Statement, A-24,25.

[6] Appendix to Jurisdictional Statement, A-26.

[7] Appendix to Jurisdictional Statement, A-26.

[8] Appendix to Jurisdictional Statement, A-12,21.

[9] Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969).

this Court to speculate as to the wisdom of a statute, or whether the evil sought to be remedied could have been regulated in some other manner.[10] Accordingly, this Court will avoid decisions of constitutional issues unnecessary to the decision of the case before it[11] and will not decide abstract, hypothetical, or contingent questions in advance of the necessity for its decision[12]. The citations of authority sustaining the proposition that legislative acts are entitled to great respect, deference and weight and will not be lightly set aside are too numerous to mention here[13]. When the power of the legislature to enact a law is called into question, the Court should proceed with great caution, and the power to review itself should be exercised sparingly and only when absolutely necessary when there is no other choice.[14]

With that background in mind, the determination must be made whether the decision of the Georgia Supreme Court possessed sufficient attributes of finality to justify this Court's granting jurisdiction. The requirement of finality, so it has been said, is not one of those technicalities to be easily scorned[15], but there is little doubt that there is a tendency

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[10] Mourning v. Family Publications Service, Inc. 93 S. Ct. 1652 (1973).

[11] Alexander v. Louisiana, 405 U.S. 625 (1972).

[12] Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969)

[13] See, 16 C.J.S. §98.

[14] Id., §98.

[15] Radio Station WOW v. Johnson, 326 U.S. 120 (1945); Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952)

on the part of this Court to give the concept of finality as practical, as opposed to a technical, construction.[16] This tendency has not been greeted with unanimity, however, witness a series of concurring and dissenting opinions by Justice Harlan in which he charged this Court with straining precedents to the breaking point.[17]

Nonetheless, it is still true that only final judgments of state courts may be appealed to this Court. For a judgment of an appellate court to be final and reviewable for this purpose, it must end the litigation by fully determining the right of the parties, so that nothing remains to be done by the trial court "except the ministerial act of entering the judgment which the appellate courts directed."[18] Although the Court is not restricted to the face of the judgment in determining finality, the test appears to be whether the order of the appellate court has in fact adjudicated the rights of the parties and that such adjudication is not subject to further review by a state court. In a remand for trial or new trial, although the decision of the appellate court is the law of the case upon the facts as then presented that law must be applied by the trial court in accordance with the evidence presented upon trial. "We cannot assume that the Supreme Court of California would hold the ordinances in question constitutional no matter what facts might be presented upon a second trial. Indeed,

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[16] Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963)

[17] Id., supra, at 542.

[18] Gospel Army v. Los Angeles, 331 U.S. 543 (1946); Department of Banking v. Pink, 317 U.S. 264, 267 (1946).

experience demonstrates that particularly in constitutional cases issues turn on factual presentation."[19] Further, "to be reviewed by this Court, a state court judgment must be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final court."[20] And to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews, the mischief of economic waste, and of delayed justice.[21]

The situation in *Construction & General Laborers' Union v. Curry, supra,* is clearly distinguishable from the instant case and clarifies the principle involved. There, the specific adjudication on a demurrer by the Georgia Supreme Court finally adjudicated the whole case. There was nothing of substance to be decided in the trial court.[22] Here, a great deal remains to be litigated; above all, the liability of the Appellants on the merits, in whose favor a decision in the trial court would moot this case, rendering a decision by this Court unnecessary. In *Curry,* the decision of the appellate court *in fact disposed of the case on the merits,* and left to the lower court the performance of ministerial acts only. Decidedly, that is not the posture of this case and, for the

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[19] Gospel Army v. Los Angeles, supra, at 548.

[20] Hudson Distributors v. Eli Lilly, Harlan, J., dissenting, 377 U.S. 386, 397.

[21] Radio Station WOW, Inc. v. Johnson, supra at 127; Republic National Gas v. Oklahoma, 334 U.S. 62 (1948); Pope v. Atlantic C.L.R. Co., 345 U.S. 379 (1953).

[22] Construction & General Laborers' Union v. Curry, supra at 551.

very powerful and cogent reasons enunciated by this Court restricting itself to their view of "final" judgments, the Court should dismiss this appeal for lack of jurisdiction.

III.

CONSTITUTIONAL CONSIDERATIONS

A. *Invasion Of Privacy As A Recognized Tort.*

It has become almost trite to say that an influential law review article, written by Samuel D. Warren and Louis D. Brandeis, articulated and gave birth to a new tort commonly referred to an invasion of the right to privacy.[23] The article absorbed and crystallized all that had gone on before and formulated with clarity the principle of the right to privacy. Over the following years, some thirty-three (33) states recognized the principle and the *Restatement of the Law of Torts* treats the right as being established in our common law.[24] In the leading American case on the subject [25], the Supreme Court of Georgia, through the eminent Justice Cobb, stated:

> "The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is

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[23] 4 Harv. L. Rev. 193 (1890)

[24] 40 Journal of the Kansas Bar Assoc. 313, 314 (1971).

[25] Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those rights which are of a public nature."[26]

The Court further stated:

"The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, *but also to the well-being of society.*"[27] (Emphasis supplied.)

Public disclosures of embarrassing private facts about a person is, as has been said, the tort of the "yellow journalist", and very well may be what caused Warren and Brandeis to write their article.[28] It is also that aspect of the tort with which we are dealing here.

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[26] Pavesich v. New Eng. Life Ins. Co., supra, 50 S.E. at 69.

[27] Pavesich v. New Eng. Life Ins. Co., Supra, 50 S.E. at 73.

[28] "The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery." Warren & Brandeis, supra, N.4 at 196.

The interest in privacy plays a number of distinct roles in regulating the relationship between the individual and society. In some instances, privacy is asserted as a restraint on governmental intrusion. Therefore, sanctity of the home underlies specific constitutional prohibitions against unreasonable searches and seizures[29], and respect for the individual's freedom of conscience has struck down governmental inquiries into beliefs and associations.[30] Additionally, *Griswold v. Connecticut*[31]. suggests that a right of marital privacy may be inferred from the general libertarian principles emanating from the *Constitution* itself.

The essential difference between the older actions for defamation or trespass and an action grounded on privacy lies in that true but indecent revelations did not come within the civil libel cause of action. Warren and Brandeis proposed the new tort in which truth would not be a defense[32]. They recognized, however, as did the Georgia Court in *Pavesich*, that the right of privacy should not prohibit "any publication of matter which is of public interest or general interest."[33].

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[29] See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949)

[30] See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958).

[31] 381 U.S. 479 (1965)

[32] Warren & Brandeis, supra at 218.

[33] Warren & Brandeis, supra at 214.

Growing out of that formulation, it has been recognized that a broad "newsworthy" privilege exists; the factual reporting in any news medium of current news in which the public has a legitimate interest is protected.[34] This has been recognized by statute in Georgia[35], but in light of the decision of the Georgia Supreme Court in this case, the statutory privilege was impliedly held not applicable. It would seem evident, therefore, that the instant case must turn on whether the specific identification of the victim of a rape by the news media is a matter of legitimate public interest and thereby protected by the *First Amendment.*

B. *The First Amendment Does Not Protect The Publication Of The Name Of The Victim Of A Rape.*

At the outset, Appellee believes that a factual decision must be made as to whether the identification of the victim of rape is "newsworthy." If the mere fact of publication in the news media was accepted *ipso facto* as sufficient to show the existence of public interest, then the exception would consume the rule and would also presume an absolutist view of the *First Amendment* that has never been enunciated by this Court.[36] Assuming a non-absolutist view of the *First*

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[34] See, e.g., Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[35] Ga. Code § 105-704 and Ga. Code § 105-709(4).

[36] See, The Free-ness of Free Speech, 15 Vanderbilt L. Rev. 1073 (1962); Miller v. California, 413 U.S. 15, 23 (1973); Breard v. Alexandria, 341 U.S. at 642.

Amendment, the right to privacy asserted by Appellee must be determined by balancing the competing and conflicting social interests. As succinctly stated in *Barber v. Time, Inc.*,[37], the right of privacy is not inconsistent with freedom of expression, but only limits its abuse. The difficulty lies in determining when legitimate public curiosity becomes unscrupulous and unwarranted and, as will be discussed, what happens when there is an enormously important social value in preserving the specific privacy under discussion.

1.

The Social Interest in Prohibiting Publication Of the Name of The Victim Of A Rape Justified The Enactment Of Ga. Code Ann. §26-9901 And the Decision Of the Georgia Supreme Court.

"Rape is a form of brutality and an invasion of privacy that few victims can ever forget."[38] The increase in the number of rapes in this Nation defies description. From 1960 to 1969, *reported* rapes increased at roughly the same rate as other crimes,[39] but in 1969, the rape rate surged ahead of other crimes against the person of an individual, and in two

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[37] 348 Mo. 1199, 159 S.W. 2d 291 (1942).

[38] Arthur Frederick Schiff, M.D., Deputy Medical Examiner, Dade County, Florida, Medical Aspects of Human Sexuality, May, 1972.

[39] 61 Cal. L. Rev. 920 (1973); Federal Bureau of Investigation, Uniform Crime Reports for the United States 61 (1971)

of the three following years, it increased markedly.[40] During the first six months of 1972, the crime of rape increased by fourteen per cent as opposed to a decrease or slight increase in other crimes against the person or property.[41] All the evidence available seems to indicate, as an index to the dimensions of the problem, that at a maximum, only twenty per cent of all forcible rapes are ever reported.[42] The reasons why victims fail to report a rape are varied, but high on the list would seem to be the desire by parents, the victim, and others, to prevent attention, publicity, further ordeal and emotional injury by investigation and appearance in court.[43] Unfortunately, there is a paucity of studies on rape. There is also little doubt that the problem is not only increasing, but that the present system for dealing with it is unacceptable to the victims.[44] That women are aggressively attacking the notion that "it's a man's world" needs no citation of

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[40] Id. at 920, FBI, Uniform Crime Reporting 1 (Jan. - Jun. 1972)

[41] FBI, Uniform Crime Reporting 1 (Jan. - Jun. 1972)

[42] 61 Cal. L. Rev. 919, 921.

[43] See, e.g., Patterns in Forcible Rape, Univ. of Chi. Press (1971); for some insight into the problems in the District of Columbia relating to the incidence of rape and its treatment by the police and courts; See, RAPE, Clinch and Schurr, Washingtonian, June 8, 1973; Sexual Assault on Women and Girls in the District of Columbia, Southern Medical Journal October 1969, pp. 1227-1231; Sexual Assault on Women and Children in the District of Columbia, 83 A.M.A. Journal 1021 (Vol. 12), Dec. 1968.

[44] See, RAPE, Clinch and Schurr, supra.

authority; and that the rape laws are not aimed at protecting women from sexual assault, but rather, to protect male interests is a truth revealed by analyses.[45] The difficulty in convicting those charged with rape is well known[46] and lies in the structure of the rape laws which protects the defendants more than the victim to a degree not found elsewhere in criminal law[47]. In short, available statistics show that rape is a uniquely difficult social problem that is not being solved.[48]

The precise percentage of victims who fail to report rape because of fear of publicity is impossible to determine, but "fear of publicity often discourages victims from appearing in court."[49] This is directly related to the woman's shame,

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[45] Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L. J. 55, 172 (1952).

[46] See, e.g., Bureau of Criminal Statistics, Cal. State Dept. of Justice, Crime and Delinquency in California 102 (1967), showing, *inter alia,* 14.2% acquittals, 9.2% dismissed, 54.2% convicted by guilty plea, 29.9% convicted by trial.

[47] See, e.g., 61 Cal. L. Rev. 919 in which it is pointed out that juries are told that a charge of rape is easily made and difficult to defend against; that the victim's testimony must be examined with caution; evidence of the "unchastity" of the victim may discredit her testimony,etc.

[48] Id., at p. 941.

[49] MacDonald, Rape Offenders and Their Victims, Springfield, Ill., Charles C. Thomas (1971), pp. 94 and 95.

which in the extreme may be so great that she does not mention the rape to anyone at all,[50] and is also the source of why rape is a "heinous, but understudied offense".[51] Female victims of rape ordinarily do not wish to cooperate in studies of their own behavior, mainly because of the shame involved in being a victim.[52] The issue of victim-precipitated rape (*i.e.*, "she asked for it")[53] often is raised to make the issue whether the victim seemed to consent, but retracted the consent and was forced, or actually invited a sexual relationship[54]. In any event, reporting a rape has such unpleasant ramifications for the victim – both because of her reputation and the necessary caution of the police in accepting those charges – that rapes too frequently go unreported.[55] The response, it is submitted, must not only be legislative, judicial and attitude changes, but also to find a way, consistent with the *Constitution*, to reduce the reluctance of rape victims and/or their families to report the crime and testify in court. That victims or their families are justified in fearing widespread and sensationalized publicity, considering the press's penchant for dwelling on sex crimes, is

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[50] Id., p. 96.

[51] 63 Journal of Crim. Law, Criminology and Police Science, No. 3 p. 402 (1972).

[52] Id., p. 406.

[53] Certainly relevant in this case. See Appellee's Affidavit in the Appendix at A-30-32.

[54] 63 Journal of Crim. Law, supra, p. 406.

[55] Id., p. 403.

hardly disputable.[56] That the avoidance or reduction of publicity will aid law enforcement is axiomatic because the fear of publicity seriously interferes with effective law enforcement. The evidence is that it does and the very statute attacked by Appellants is precisely one way of aiding the prosecution of this specific crime.[57] Judicial recognition of this is found in *State v. Evjue,* 253 Wisc. 146 (1948), in which case the court said:

> "It is considered that there is a minimum of social value in the publication of the identity of a female in connection with such an outrage. Certain it is that the legislature could so find. At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim. When the situation of the victim of the assault *and the handicap prosecuting officers labor under in such cases is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime,* there can be no doubt

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[56] See, Crime and Publicity, The Impact of News on the Administration of Justice, Friendly and Goldfarb, the Twentieth Century Fund, New York (1967), in which the authors debate the fair trial versus free press issue and the pros and cons of delayed reporting. They also concluded that American press coverage of crime news is often excessive and offensive, pandering to the lowest taste and unnecessary even for the most basic commercial reasons, at page 34.

[57] See also, Section 6.0, Chapter 2, General Regulations of the New York City Police Department, which provides that representatives of the press may be advised of current news if the ends of justice are not defeated, "... but under no circumstances will the identity of the following be revealed: ... 4. victims of a sex crime."

that the slight restriction of the freedom of the press prescribed by section 348.412 is fully justified." (Emphasis supplied.)

That an enormously important social value may be attained by aiding the enforcement of the laws against rape through reducing the fear of publicity is therefore beyond dispute. Whatever its benefits, press publicity in this narrow area is no more desirable than it is a "protection" to a youthful offender being handled in the juvenile court.[58] The question remaining thusly is whether it is socially useful to identify the victim of a rape.[59]

It is on the resolution of this question, Appellee submits, that the case turns.

2.

Publication Of The Name Of the Victim Of a Rape Has No Social Utility And Is Not A Matter In Which The Public Has A Legitimate Interest.[60]

[58] For a comparison, see Publicity and Juvenile Court Proceedings by Gilbert Geis, 30 Rocky Mountain Law Review 101 (1958), and by the same authority Identifying Delinquents in the Press, Federal Probation, Vol. XXIX, No, 4, December 1965, pp. 44-49.

[59] See, Nappier v. Jefferson Standard Life Ins. Cc , 322 F.2d 502 (CA-4 1963), holding that a claim for invasion of privacy was stated by a news broadcast identifying two rape victims in violation of a state statute similar to the Georgia statute in issue here.

[60] Restatement (second) of Torts (Tent. Draft No. 13, April 27, 1967), p. 126, section 652F, states the privilege as to matters of public interest in terms of matters in which the public has a legitimate interest. This implies that the scope of the privilege should be determined by the courts and not by the press itself. In adjusting the conflict between the individual desire for privacy and of the press to inform the

"A newspaper should not invade private rights or feelings without sure warrant of public right as distinguished from public curiosity."[61] What is true for the printed news media is at least as pertinent to television and the quoted ethical canon displays acknowledgement by a prestigious press association that there is a distinction between matters about which the public has a right to know, irrespective of individual feelings, and an area in which, although the public might be interested, the press has a duty to refrain from transgressing upon individual privacy. The issue is not whether the public, or a segment thereof, is curious, or desires to know something, but rather, whether the public has any legitimate concern to justify the intrusion into a person's private life.[62] To paraphrase the language of this Court in *Kois v. Wisconsin,*[63], how is the name of the victim of a rape rationally related to the news report of the event itself? For all the reasons usually ascribed to the rationale underlying freedom of speech, *i.e.*, "access to social, political, esthetic, moral and other ideas and experiences"[64] which citizens require in order to perform self-governance,[65] is not the

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public, the courts must determine what are matters of legitimate public interest. In this case, there is both a judicial and legislative determination that identification of a rape victim is not a matter of legitimate public interest.

[61] Code of Ethics or Canons of Journalism, American Society of Newspaper Editors, article 6.

[62] See, Meetze v. Associated Press, 230 S.C. 390, 95 S.E. 2d 606 (1956), for a definition of an actionable invasion of the right to privacy, quoted with approval in Nappier v. Jefferson Standard Life Ins., Co., supra.

[63] 408 U.S. 229 (1972).

[64] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969).

[65] Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971).

public's interest in factual news reporting sufficiently served by an account of the event itself without public identification of the person victimized?[66] It is submitted that Appellants have not in any instance addressed themselves to this question, but have rather cited at length cases which already assumed the central question on which the case turns. Appellee has no quarrel with the decisions of this Court assuring that the *First Amendment* is not nibbled away and concedes that were the public identification in the news media of the name of the victim of a rape a legitimate matter of public concern, then Appellee's cause of action would fall – statute or no statute. But no such legitimate public interest has been or can be shown, nor has it been so articulated other than in the very terms used by the Wisconsin Supreme Court in *Evjue, supra, i.e.*,[67] "a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim." Appellants' evident justification for its publication does not grapple with the societal issues or the balancing that is involved, nor does it articulate just how the utterance involved is of public or general concern.[68] Their argument that since the name of the victim was contained in the public record (*i.e.*, indictment and docket), it was *ipso facto* privileged again begs the essential question. Surely by the fact that private citizens turn to the courts, voluntarily or, as here, involuntarily, as the innocent victims of circumstances, and that a judicial record of the transaction is made, does not sweep away their right to privacy through

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[66] See, 56 Cal. L. Rev. 935, 966-967 (1968).

[67] State v. Evjue, supra.

[68] Rosenbloom v. Metromedia, supra.

some sort of implied waiver theory! It should be sufficient to say that the disclosure of the identity of the victim of rape either is or is not a matter of public interest and general concern in Georgia, aside from any so-called public record privilege. It is obvious that the Georgia Supreme Court thought the privilege of reporting judicial proceedings limited by the statute prohibiting disclosure; a justification based upon a public records theory ought similarly to be rejected by this Court.[69] The statute, in brief, aims at overpublication in the media and not with court records that will, by themselves, cause very limited publicity.

Taking into consideration all of the competing social values, particularly the compelling one regarding effective law enforcement and the fear by victims of publicity to an extent unknown in the context of other offenses, and the tenuous argument that can be made in favor of public disclosure, can it really be said that the court or legislature was without power to attain such a overridingly important goal?[70]

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[69] Also, such a postulate would imply that the media could ramsack the courthouse files at random and select the most sensational divorce cases and then titillate its readers with all the details, including names, without regard to the fact that the cases were of no public interest, but were purely private domestic disputes. Such a broad view of the privilege would have the gravest social implications. It would certainly put an end to the right to privacy, at least for litigants.

[70] Compare this with those jurisdictions in which the legislature has decided that the rehabilitative goals of the juvenile law are so important as to override the right of the press to identify juvenile defendants (e.g., Virgin Islands Code, Title 5, Section 2511, Fla. Statutes Section 801.14, Ga. Code §24-2432).

3.

Appellee's Privacy Is Protected By The First Amendment.

This Court has articulated a theory of the *First Amendment* over the past decade that forms the basis of constitutional arguments for and against the public disclosure tort. Starting with *New York Times Co. v. Sullivan,*[71] in 1964, the Court, in applying the free speech guarantee, has emphasized the integral role of free speech in a democratic system and has found a *First Amendment* interest in protecting a "system of freedom of expression."[72] In deciding the constitutionality of a specific utterance, this Court has considered *the merits* of the utterance *and* its place in a constitutional system of free speech, reasoning that:

> "... free speech is protected not for some intrinsic value of speech but because it is a necessary condition for the making of informed decisions about matters of government, decisions which all citizens in a democracy are called on to make. Speech provides information, the raw material from which citizens can make self-governing choices."[73]

But this Court, while doing much to ensure the free flow of information from speaker to listener has not explicitly held that there may be a powerful *First Amendment* interest in protecting the privacy of the individual in certain cases, *i.e.*,

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[71] 376 U.S. 254 (1964).

[72] See, T. Emerson, The System of Freedom of Expression, p. 517 (1970), in regard to potential unconstitutionality of the tort of public disclosure, a potentiality with which Appellee does not concur.

[73] Privacy in the First Amendment, 82 Yale L. J. 1462, 1464 (1973).

an individual's ability to control information about himself so that he may be free to make certain choices important to him which, if disclosed, would impede or chill his right to think or do unpopular things.[74] The secret ballot, the right to possess so-called obscene materials in the privacy of one's home[75], the right to marital privacy[76], and membership in associations are examples of situations in which a citizen ought to have the right to privacy and be confident of its protection. Therefore, the *First Amendment* has an interest in protecting the privacy of the individual which is as necessary to preserve a system of free expression as is the more traditional concept of freedom of the press.

The Court has held that the *First Amendment* has an interest in protecting published information, whether it be opinion or fact[77], whether the fact be true or false[78]. whether the subject of the information be public official or private citizen[79], and whether the subject be well-known or obscure[80], *if the information has First Amendment values, i.e., aids the citizen in making informed decisions.* The

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[74] Id. pp. 1462 et seq.

[75] Stanley v. Georgia, 399 U.S. 557 (1969).

[76] Griswold v. Connecticut, 381 U.S. 479 (1965).

[77] New York Times v. Sullivan, 376 U.S. 254, 271-273 (1964).

[78] Id. p. 271-272.

[79] Rosenbloom v. Metromedia, supra at 31-32.

[80] Id., at 31-32.

converse of this position is equally true – the revelation of private facts have an inhibiting effect on the individual, chilling or destroying his ability to make decisions.[81]

In the instant case, in which Appellee's privacy claim faces the Appellants-publishers' claim that the information published is in the public interest and therefore privileged, the competing interests arise from the same constitutional provision with an important distinction that sets this case apart from others. Not only was Appellee inhibited in making decisions and choices because of the invasion of his privacy; the interference to this freedom seriously impeded the prosecution of a brutal crime with social affects far more adverse than that served by the publication. Furthermore, we have here a legislative determination that ostensibly decided which interest outweighed the other, *i.e.*, public disclosure of the identity of a rape victim was vastly less important than encouraging victims of rape to report the crime and testify.

Is not the solution,, as suggested by highly persuasive note in the Yale Law Journal [82], to recognize that the invasion of privacy consists not in disclosing the information itself, but in linking the information to the individual in question, by name or otherwise. As the Georgia Supreme Court cogently noted in this case, "this statute does not prevent disclosure or publication of the 'event'; it merely prohibits the disclosure or

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[81] See, 82 Yale L. J. 1462 at 1468 and 1469 for the applicability of this reasoning to James Hill in Time, Inc. v. Hill, 385 U.S. 374 (1967).

[82] 82 Yale L. J. 1462.

publication of the identity of the victim of the event."[83] In short, the constitutional privilege to tell the public a piece of news should be judged separately from the "constitutional" privilege to tell the public who was involved. Presumptively, commercial success ought to have nothing to do with the privilege under discussion, though it is hardly a secret that the media's preoccupation with scandal and especially sex brings financial success.[84] The trite but accurate saying that "names are news" is undeniable, but that is a commercial fact unrelated to the constitutional decision at stake. Does the name of a given person linked to some information have value to those who hear or read the resulting news items, in that they will find it useful in arriving at the decisions of self-government? Does whatever value the use of the name of a rape victim might have[85] overwhelm the individual's *First Amendment* interest in privacy? Does not such a calculation, not in the area of the event itself, but in the area of identification, compel a conclusion that identification has a terribly negative effect on our social system by deterring

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[83] Jurisdictional Statement, A-24.

[84] See also, Briscoe v. Reader's Digest Assn. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), in which it was held that if the Court decides the name is not "of legitimate public interest," the publisher has no defense of privilege and the plaintiff's cause of action is good.

[85] Appellee frankly states that he has never heard from any source whatever a single logical reason suggested or proposed as to a positive value that would be served by publicly identifying the identity of the victim of a rape, whoever she might be. All the results appear to be negative and detrimental to the individual and society.

victims and their families from reporting rapes, not to mention to appalling embarrassment and humiliation caused to these unfortunates through no fault of their own.

Appellee believes that a public disclosure tort action such as this, dealing with the unauthorized use of names in a context wherein BOTH individual *and* public interests coincide in favor of privacy, must be sustained unless this Court holds that the publication privilege obliterates any zone of privacy.

CONCLUSION

For this Court to assume jurisdiction of this case in its present posture, before a trial or adjudication of the merits, would do violence to the letter and intent of *28 U.S.C. §1257.* It would needlessly have this Court review the constitutionality of state legislation and a decision of the highest court of a state without knowing, through a trial, whether the facts of this case will even bring into play the issues sought to be reviewed. Repeated decisions of this Court point out the inappropriateness of deciding constitutional issues except when necessary, and only upon a final judgment or adjudication of the highest court of a state. Therefore, this appeal should be dismissed.

Should this Court grant jurisdiction, however, the type of invasion of privacy at issue concerns unreasonable publicity given to one's private life. This species of the tort is not concerned with the truth or falsity of the material published, but rather focuses on the publication of material concerning an individual's private life, which is highly offensive to the

reasonable man with ordinary sensibilities.[86] Aside from the postulated theory that there is a *First Amendment* interest in privacy, the constitutional protection applies only, as this Court explicitly held in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), to matters of public interest:

> "We hold that the constitutional protections for free speech and press preclude the application of the New York statute to redress false reports of *matters of public interest* in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."

And although there was an emphasis on falsehood germane to a defamation case and irrelevant to a privacy case, the same constitutional principles seem to apply to either tort. The impact of the *Hill* decision, by its very terms, was expressly limited to the sphere of publications in which the public has a legitimate interest. The public interest test implies *the existence of a non-public interest zone*, and the rationale of this Court's opinion in *Hill* indicates that the malice and falsity tests would not be there applicable. In this category would be suits based on commercial exploitation or involving unjustified revelations of embarrassing or offensive details of a person's life.[87] Although the eminent writer Meiklejohn does not balance individual interests against the *First Amendment*, he does define speech as public or private.[88] Once an expression is found to have "governing importance", it is

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[86] Restatement (second) of Torts, Section 652C, commented at 115.

[87] See, A. Meiklejohn, Political Freedom (1960).

[88] Id., at 56-57, 79.

protected; if not, presumably, actions for invasions of privacy would be permitted when the public interest was not involved.

Whichever theory is employed, "public interest in the abstract" is not ordinarily a simple phrase to define, but if ever a specific report rendered that definition less difficult, this is such a case. That no precise definition can be made for all cases in which all courts can agree is clearly an acceptable price to be paid for any approach to the *First Amendment* which is not absolute. A case-by-case method is, after all, the common law approach, typified by flexibility and abstention from dogma.

This case does not and should not have broad sweep, nor does Appellee suggest a rule of constitutional law any broader than the facts presented herein. Based upon a balancing of the interests theory, or on competing *First Amendment* interests, the principles enunciated in this case should and must have reference to the specific facts. Any other resolution could have the severest negative effects; *i.e.*, an absolutist view *vis-à-vis* public disclosure will obliterate the individual interest in privacy and the strong public interest in its affirmance in this case with decidedly negative repercussions for law enforcement; and a decision that sweeps too broadly in the other direction without regard to the facts could undoubtedly give a green light to those who would like to stifle a free press.

Appellee cannot urge too strongly his support for free speech and press; but, at the risk of seeming redundant, respectfully submits that the speech involved here simply does not rise to the level that warrants *First Amendment* protection.

Acceptance of the right to privacy has grown with the increasing capability of mass media and electronic devices to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public scrutiny.[89] Surely there is a line, an outer limit, at which point the individual is given constitutional protection and justice.[90] To say otherwise would be to say that "*the First Amendment* not only precludes effective prosecution of the right of privacy,"[91] but also obliterates the at least equal public interest of the state in securing adequate law enforcement.

Respectfully submitted,

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[89] Briscoe v. Reader's Digest Assoc., supra; Gill v. Curtis Pub. Co., 38 Cal. 2d 273, at 277-278, 239 P.2d 630; Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 228, 258 P.2d 441.

[90] It is suggested that the usual role of the Press being depicted as David doing battle with Goliath is not apposite in this instance. The media have become very powerful indeed, especially in those cities which have but one newspaper or a single television outlet and wherein the press as an institution may be as powerful as government. Such power may not be wholly beneficial as absolute power never is. The concern over privacy is of intense current interest as witness proposals to protect individual's from prying computers, financial institutions and even two-way cable television, as noted in an address in June, 1974 by Vice President Gerald Ford to the Convention of the State Bar of Georgia in Savannah. See also, Alan F. Westin, Privacy and Freedom, Atheneum, New York, 1967.

[91] Time v. Hill, supra, dissent of Justice Fortas.